

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

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UNITED STATES OF AMERICA, . Case No. 1:18-cr-043  
Plaintiff, . **Motions Hearing/In-Person**  
- v - . **Status Conference**  
YANJUN XU, . Wednesday, January 22, 2020  
Defendant. . 10:05 AM  
. . . . . Cincinnati, Ohio

REDACTED TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE TIMOTHY S. BLACK, JUDGE

APPEARANCES:

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P R O C E E D I N G S

(In chambers at 10:05 AM.)

THE COURT: Okay. Let's go on the record.

We're here in chambers on the criminal docket in the case of *United States of America versus Xu*. We are here for oral argument on four pending motions and for status conference.

For purposes of the record, I ask that you enter your appearances. Who appears as counsel for the United States of America?

MR. MANGAN: Tim Mangan and Emily Glatfelter.

THE COURT: Good morning to the two of you.

And on behalf of defendant Xu?

MR. KOHNEN: Your Honor, good morning. Ralph Kohnen.

MR. WILLIAMSON: Philip Williamson.

MS. CORS: Jeanne Cors. Good morning, Your Honor.

THE COURT: Good morning to the three of you.

My law clerk, Cristina Frankian, is present as well.

The fact that we are here in chambers does not obviate the fact that we're here in part for oral argument on the pending motions. I find this more informal setting of chambers more conducive to discussion and understanding than formal argument in the courtroom. But defense has asked for oral argument; the Court is providing it today.

I believe my law clerk e-mailed you and indicated that I don't need oral argument consisting of recitation of what is in

1 the briefs. The motion to dismiss and the motion for a bill of  
2 particulars, in particular, present questions of law. We've  
3 worked hard on it, we're ready, but I'll give you an  
4 opportunity to say anything you wish if you wish.

5 The motion for disclosure of *Brady* and *Giglio* materials, I  
6 need to understand more clearly what the difficulties are. I  
7 find that the hyperbole in defendant's pleadings makes it  
8 difficult for me to truly understand what the difficulties are,  
9 and I'm hoping that oral argument, slash, status conference  
10 will enable us to identify truly what presents and try and  
11 effect practicable and reasonable remedies.

12 Of the four motions pending, one is a motion for pretrial  
13 disclosure of 404(b) evidence. Pursuant to the parties'  
14 jointly-proposed calendar, that evidence is due on February 24,  
15 2020. I believe, therefore, that motion is moot.

16 The government has produced 9,000 pages of hot documents  
17 that they intend to use to prove their case. A review of those  
18 documents reflects precisely what the government is going to go  
19 forward on. They produced those documents in indexed,  
20 foldered, translated searchable documents. The additional  
21 productions are largely from the defendant's own devices and  
22 records.

23 (The Court and law clerk confer privately.)

24 THE COURT: So that's sort of my opening statement.  
25 The defendant is the movant, so can we have argument, a

1 dialogue, and if need be, can I stop you and try and pinpoint  
2 exactly what's going on and ask the government to weigh in.

3 Mr. Kohnen, will you be heard?

4 MR. KOHNEN: Gladly, Your Honor.

5 First of all, with respect to the noted hyperbole in the  
6 *Brady, Jencks, Giglio* motion, I hope the Court will --

7 THE COURT: All motions.

8 MR. KOHNEN: Okay.

9 -- I hope the Court will consider that at least as an  
10 indication of how seriously we take these matters.

11 THE COURT: I'm just telling you, in the spirit of  
12 full disclosure, it's not helpful to the Court. You guys are  
13 sophisticated lawyers that know what presents and what the  
14 specific issues are, and I'm glad we're having this  
15 opportunity.

16 MR. KOHNEN: Would you like to deal with any of the  
17 motions in any particular order?

18 THE COURT: Yeah. The first two that I think you  
19 fully briefed, they're questions of law. If there's something  
20 you want to supplement on the motion to dismiss or the motion  
21 for bill of particulars, yes. And I'll hear from anybody.

22 MR. KOHNEN: Jeanne, do you have anything to add on  
23 that?

24 MS. CORS: No, I don't.

25 MR. KOHNEN: I don't have anything. We really don't

1 have anything to add on the motion to dismiss or the motion for  
2 bill of particulars. As the Court can tell, and we appreciate  
3 the fact that you've read the memos, but the reason I mention  
4 that is because, as I think you can probably tell, we see all  
5 of these -- all three of these motions as connected to one  
6 another. And I think, to boil it down to its essence, the  
7 connection really is -- can be as simple as one word, really:  
8 information. Not as in the charging document but as in  
9 information, the body of material that we need. We have --

10 THE COURT: Can I interrupt and clarify?

11 MR. KOHNEN: Sure.

12 THE COURT: The government has not suppressed  
13 evidence. They've given you everything they have, and you're  
14 not happy with the ability to manage it.

15 MR. KOHNEN: Yeah. And I think they've given us  
16 everything they -- well, I don't think they've given us  
17 everything they have. I don't know if they've given us  
18 everything they have.

19 THE COURT: I'm just trying to make the point I don't  
20 think it's an issue of suppression. I think it's an issue of  
21 manageability of what you've been given.

22 MR. KOHNEN: Yeah, the CIPA material aside. We have  
23 no idea what's going on with that.

24 THE COURT: The Court's on that.

25 MR. KOHNEN: Okay.

1        Yeah, they've given us the material. They've attributed it  
2 to Mr. Xu. To our satisfaction, at least, they haven't  
3 demonstrated that it's exclusively from Mr. Xu.

4        But the more important thing is, it's not in a form that we  
5 can use, and it's voluminous. They have gone to great lengths,  
6 apparently, to find -- through word searches, as they've  
7 represented to us in prior conferences, and other things --  
8 inculpatory material, and they've found those needles in the  
9 haystacks, they've translated them, and they've produced them  
10 to us.

11        Now they refuse to use those same capabilities to assist us  
12 and to fulfill their obligation to seek and find exculpatory  
13 material.

14                THE COURT: And their obligation is to seek and find,  
15 not to tab, organize, translate, and present for you,  
16 particularly if they're your documents.

17                MR. KOHNEN: Judge, I think it would be great if they  
18 would start with an acknowledgment of their obligation to seek  
19 and find and embark on efforts to do so. To date they haven't  
20 even done that, and to date they refuse to do that.

21        It would be easy for us to work out some kind of mechanism  
22 to get the information identified and translated once they were  
23 willing to do it. My point in referring back to the 9,000  
24 documents --

25                THE COURT: Pages?

1 MR. KOHNEN: -- 9,000 pages is they've now proven they  
2 have the ability to do that, and yet they won't do it for us.

3 That's the first problem that we have, and I think it's the  
4 only really significant problem. Because if they were to  
5 commit to do that, then I think the rest of this would fall in  
6 line.

7 THE COURT: Tell me what the problems are with the  
8 format of what's been produced to you.

9 MR. KOHNEN: I will start with that, but it's not just  
10 the format that's our problem.

11 THE COURT: You've gotten a bunch of documents.

12 MR. KOHNEN: Right.

13 THE COURT: And now you've got to --

14 MR. KOHNEN: We now have readable electronic data.

15 THE COURT: Okay.

16 MR. KOHNEN: That's all we have. It's not indexed;  
17 it's not searchable.

18 THE COURT: All right. Let's talk about not  
19 searchable. I thought they produced virtually everything in  
20 PDF.

21 MR. KOHNEN: They probably have.

22 THE COURT: So you can --

23 And you can help me if need be.

24 With software, you can pop it into a PDF that's searchable.

25 MR. KOHNEN: I don't think --

1       Jeanne, maybe you can help us.

2       I don't think, number one, we have the software. And I'm  
3 not sure that the equipment that Mr. Xu has is capable of  
4 accommodating that software.

5               THE COURT: All right. I'm going to interrupt and ask  
6 Ms. Frankian to speak to that.

7               THE LAW CLERK: If the information --

8               THE COURT: Louder for me.

9               THE LAW CLERK: If the information is already in a  
10 PDF, even if it's in Mandarin, it's still searchable. So, for  
11 instance, all you need is the character, and you just copy and  
12 paste it. So Control F, Copy, Paste, and it will find it for  
13 you. You won't know what it means, but you'll find it. And  
14 then that will at least get you to the sections where that  
15 particular character is.

16              THE COURT: And you can translate that character.

17              THE LAW CLERK: And then you can translate that.

18              MR. KOHNEN: Right. Which leads me to the bigger  
19 logistical problem.

20              THE COURT: Okay.

21              MR. KOHNEN: Which, because of the logistical  
22 difficulties, is a bigger problem, frankly.

23              THE COURT: Tell me what it is.

24              MR. KOHNEN: Mr. Xu is stuck at the Milan Federal  
25 Correctional Institution.



1 THE COURT: And he has an opportunity to review, in a  
2 language he speaks, the documents that came from him.

3 MR. KOHNEN: Allegedly came from him, but --

4 Yes, he does, but he's not a trained lawyer. He doesn't  
5 understand the American judicial system. He doesn't know what  
6 to look for. It's that simple. And even if he did know what  
7 to look for, if we gave him the benefit of the first year of  
8 law school, it wouldn't be us doing it.

9 THE COURT: He can certainly identify the irrelevant  
10 portions, the photographs that take up all this stuff, the  
11 e-mails from Joseph Bank, whatever it is. He can tell you  
12 those are irrelevant and start to weed it down, can't he?

13 MR. KOHNEN: Judge, there are relevance questions that  
14 go to this court and the Court of Appeals and the Supreme Court  
15 every day.

16 (Cellphone rings.)

17 MR. KOHNEN: Pardon me. I'm sorry about that.

18 No. The answer is no, he's not capable to deal with --

19 THE COURT: Telling you what's spam in his stuff?

20 MR. KOHNEN: Spam is one thing.

21 THE COURT: I consider Joseph Bank spam.

22 MR. KOHNEN: It could be. But what if Mr. Xu had a  
23 receipt from Joseph Bank on the day he was alleged to have been  
24 in Amsterdam?

25 THE COURT: Well, then would he not tell you he was in

1 Joseph Bank in Russia at the time and you would go looking for  
2 that document?

3 MR. KOHNEN: My point, Your Honor, is we can't trust  
4 him to do what lawyers have to do.

5 THE COURT: And then I'm suggesting, in a practical  
6 world, he can help you enormously by identifying what's clearly  
7 not relevant.

8 MR. KOHNEN: Yes. But clearly not relevant --

9 THE COURT: I'm just talking about --

10 MR. KOHNEN: -- is just a small step --

11 THE COURT: Okay.

12 MR. KOHNEN: -- on the way to finding *Brady* material,  
13 *Jencks* material, and *Giglio* material. Again, fights repeatedly  
14 in this court, in the Sixth Circuit, in the Supreme Court among  
15 lawyers, sophisticated lawyers, about what really is *Brady*  
16 material. Right? How are we going to trust not just a  
17 civilian but a civilian from an entirely different culture to  
18 screen that and to do that work? It's just impractical. It's  
19 not just impractical --

20 THE COURT: That assumes that it's the government's  
21 responsibility to translate it and provide it all to you. Can  
22 you not get to work on figuring out what's in his own  
23 documents?

24 MR. KOHNEN: We are working furiously at that.

25 THE COURT: I'm sure you are. That's why you've got a

1 long time for trial.

2 MR. KOHNEN: But you've got to understand, we don't  
3 have the capabilities they have. One of our filings made  
4 reference to the unit that the Department of Justice and the  
5 FBI has, which I'm sure these prosecutors or their  
6 investigators took advantage of. Okay?

7 THE COURT: I think you have the technology, the  
8 smarts, to get this done.

9 MR. KOHNEN: We do.

10 THE COURT: And I was just searching --

11 MR. KOHNEN: We do, but we --

12 THE COURT: -- for ways to practically be of  
13 assistance.

14 MR. KOHNEN: We do.

15 THE COURT: You do have the ability?

16 MR. KOHNEN: We do, but we don't have the time and we  
17 don't have the manpower.

18 THE COURT: Anything further?

19 MR. KOHNEN: Judge, you know, I don't want to beat a  
20 dead horse, but we get precious few hours per visit roughly  
21 every other week with Mr. Xu. I mean, I understand where the  
22 Court's coming from, and we -- it is physically possible to get  
23 it done, but it's not physically possible to get it done before  
24 I retire from the practice of law.

25 MS. CORS: If I could weigh in just on another

1 practical issue we're facing with respect to where Mr. Xu is  
2 and the computer access he has.

3 Even assuming he has the knowledge regarding the case and  
4 the legal knowledge to go through and identify what is relevant  
5 in his mind, what is extraneous, we don't have a way to easily  
6 have him identify that and get that information even to us  
7 because we're not linked.

8 You know, normally in our firm we would use something like  
9 Relativity or Summation, and people could tag documents, mark  
10 them, put notes on them, and everyone would have access to  
11 that. We don't have that here.

12 I mean, what he has is a pretty old computer that he can  
13 pull up this information, look at the equivalent of the screen  
14 of his phone or a phone, or an e-mail account, and start going  
15 through it.

16 But then there's really no practical way, even if he has  
17 identified, you know, ten references in the phone data, to be  
18 able, for us, to then easily understand and know what that was.  
19 I mean --

20 THE COURT: Why can't he identify that for you?  
21 Although he can't do it with some sophisticated software, he  
22 can write it down, can't he? I'm just trying to understand.

23 MR. KOHNEN: Judge --

24 THE COURT: Let me -- let me hear the response to  
25 that.

1 MS. CORS: He, I suppose, could say, "If you go into  
2 this device, this folder, this number," we might be able to  
3 then backtrack into that, but that becomes extraordinarily time  
4 consuming and difficult to get us that information and again  
5 we're back to, you know, at most we're getting maybe eight  
6 hours in a two-day block to meet with him. That -- honestly,  
7 everything that's taking place then tends to be answering his  
8 questions and still trying to get through the discovery.

9 So I don't think it's practical for him to be able to  
10 navigate these devices, somehow pinpoint what is relevant, and  
11 then tell us.

12 THE COURT: Okay.

13 MS. CORS: The other problem is, you know, it comes  
14 back to some of these other motions. But from our perspective,  
15 we're at a deficit, even as lawyers, in terms of knowing -- you  
16 know, talking about certain character searches, even if we were  
17 able to identify characters -- and I think that's a big "if"  
18 given the number of Chinese characters there are in the  
19 different dialects -- we have very little information at this  
20 point about the core case. And, you know, usually you have  
21 that information and then you develop search terms based on  
22 that information.

23 So we're at a deficit with information and we're at a  
24 deficit with respect to the language and this issue of  
25 characters.

1 THE COURT: You wanted to say something?

2 MR. KOHNEN: Judge, mechanics. I was just going to  
3 say, you know, he can't even sit down with a piece of paper and  
4 a pen -- or a pencil, probably, more likely -- and jot down  
5 Bates numbers because the material they gave us doesn't even  
6 bear Bates numbers.

7 So maybe to way overuse a bad analogy, he might be able to  
8 shrink the haystack a little bit for us.

9 THE COURT: He might what?

10 MR. KOHNEN: He might be able to shrink the haystack a  
11 little bit for us, but we're still not going to be able to find  
12 the needles.

13 But I think most importantly, I don't want to lose sight of  
14 the legal obligation that the government has here. They have a  
15 duty to find and turn it over to us. They can't -- and our  
16 hyperbole is we should have been less, because I hope this  
17 message is clear. It's their obligation. Okay? *Brady, Kyles*  
18 *versus Whitley*, all the cases that come along, it's their  
19 obligation, of the material that they possess, to find it and  
20 to turn it over to us.

21 That was actually memorialized in a memo to all of these  
22 prosecutors in January of 2010, January 4th of 2010, almost  
23 exactly ten years ago, by a deputy attorney general named Ogden  
24 that they recognize this obligation. For whatever reason, the  
25 prosecution in this case is ignoring that, is refusing to

1 recognize that obligation.

2 THE COURT: I reject it out of hand.

3 I'm looking at *Warshak*, which you didn't even cite until it  
4 was brought to your attention. Be that as it may, what else do  
5 you want to say before I hear from the government?

6 MR. KOHNEN: I think we did a pretty darned good job  
7 of distinguishing *Warshak* in our reply brief. And if the Court  
8 would like to hear more on that --

9 THE COURT: No, thank you.

10 MR. KOHNEN: -- we're happy to do it.

11 THE COURT: I'll look at your reply brief.

12 MR. KOHNEN: I hope you will, Judge.

13 THE COURT: I have.

14 MR. KOHNEN: Okay. Because the *Warshak* case was  
15 completely different than this case.

16 I think also that the Court has to recognize, must  
17 recognize, the facts of this case and the circumstances that we  
18 have here are completely unique. This is a helpless defendant.  
19 I mean, this is a much more difficult situation than Steve  
20 Warshak and his mother and his employees found themselves in.  
21 And I'm familiar with the Warshak case because I signed that  
22 Indictment.

23 THE COURT: I understand. We each have a role to  
24 play. Was there more you wanted to say at oral argument?

25 MR. KOHNEN: Anything to add?

1 MS. CORS: I think the only other point, and, you  
2 know, we do flush this out, but in terms of the duty to provide  
3 *Brady*, at its core when you look at any of these open file  
4 cases, the courts, where they have permitted open file, it's  
5 been on the basis that both sides are equally in a position to  
6 find the information. And given the limited information we  
7 have about this core case, what companies are at issue, what  
8 trade secrets are at issue, who these co-conspirators are, we  
9 aren't in a position, even as lawyers, to properly identify  
10 *Brady* material to the same extent that the government is right  
11 now.

12 And I think that is a key issue that each of those courts  
13 addressed and, in the cases the government cites, found that in  
14 fact the defendant was in a position, an equal position, to  
15 find *Brady*, and that's just not the situation we're in right  
16 now.

17 THE COURT: Very well.

18 Did you have anything you wanted to weigh in at this point,  
19 or pivot to the government?

20 THE LAW CLERK: I did have a question. The 9,000  
21 pages that were presented, is that not the core case?

22 THE COURT: What was the question?

23 THE LAW CLERK: The 9,000 pages that have been  
24 translated and presented, is that not a sufficient outline of  
25 the case? I think at one point Mr. Mangan had said that



1 whatever documents they intend to use in their case they'll  
2 translate or they have translated and given to you and that  
3 they'll do so going forward.

4 Doesn't that give you the information that you need  
5 regarding the case, or is there something that's still missing?  
6 Just for purposes of trying to come up with a practical  
7 solution.

8 MR. KOHNEN: We don't know. I mean, that's their  
9 representation some time ago. Now, the breadth of the case,  
10 and particularly with respect to the conspiracy counts and the  
11 either intrinsic or 404(b) evidence, depending on how you look  
12 at it, has expanded greatly. At least that's our conclusion  
13 based on these supplemental productions that are pretty large.

14 The one thing I'll --

15 THE COURT: Will you speak up, please.

16 MR. KOHNEN: Yeah. I'm sorry.

17 The one thing I'll repeat is, that was identified to us by  
18 the government, and I'm repeating essentially what you just  
19 said, but as their core case.

20 In our view, the case, at least the evidence that they  
21 intend to have available to them, has expanded greatly. I  
22 don't know if the core case and its 9,000 documents have  
23 expanded greatly. But I want to stress that all of that, by  
24 their own admission, is inculpatory in nature and not  
25 exculpatory.

1 THE LAW CLERK: Would it be helpful for you to  
2 provide -- do you know what keywords were used to search for  
3 the documents that they gave you?

4 MR. KOHNEN: No. And as I'm sure you know, we had  
5 suggested at the very end of our reply memo that we would like  
6 to use those tools they have with our own search terms.

7 THE COURT: Did you have anything more?

8 THE LAW CLERK: Just whether the government would be  
9 willing to add some search terms.

10 THE COURT: Well, let's hear where we are. We've  
11 heard oral argument from the defense. Who wishes to be heard  
12 in response to what we've heard and had presented to us?

13 MR. MANGAN: I will, Your Honor.

14 THE COURT: Good.

15 MR. MANGAN: With respect to this particular issue,  
16 there are a few things I wanted to highlight, particularly that  
17 came from their reply memo, because that's when they kind of  
18 got deeper into the issues that were raised in *Warshak*. And  
19 they raised a few things in describing the discovery that  
20 concerned us in terms of -- that may have muddied the waters a  
21 little bit.

22 I did want to offer to the Court, before I jump into some  
23 of the details, to try to clarify, you know, exactly what we've  
24 been doing. We took the letters that we produced with the  
25 discovery, and, you know, with each one it has a spreadsheet

1 that lays out here's what's in this production, we called them  
2 tiers, you know, with the Bates labels and then the  
3 classification levels.

4 And it has come out in pieces. We've got, you know, six or  
5 seven tiers. But I put all the letters and the spreadsheets  
6 together that we can submit to the Court and provide to you so  
7 that you can have a full understanding of how we've tried to  
8 present things so that they would not be unduly onerous.

9 I also have -- at one point when we provided the  
10 translations to them and our Bates labeling, they had a concern  
11 that, well, it's hard to find that translation in the  
12 electronic version that's in the report. And so they asked  
13 for, sort of, a way to cross-reference the translations to the  
14 electronic report.

15 So last July we had provided them with a letter and then a  
16 different spreadsheet that goes through a cross-reference for  
17 each of those items. And then for many of those  
18 cross-references we gave attachments that have screen shots of  
19 it to help sort of guide them through the process of finding  
20 where those translations were.

21 And some of this, we wanted to mark it in case the Court  
22 was willing to look at this, or at least accept it, in the  
23 record. We think it's important to show, based on what they  
24 placed in the reply, the efforts that we've gone to to try to  
25 make this manageable and not onerous on the parties, but it

1 also gives the Court a little bit of an understanding, just in  
2 terms of screen shots, as to what it looks like when you look  
3 at some of these electronic reports.

4 So with that background, I wanted to touch on a few points,  
5 Your Honor. First, they identify or they made a statement that  
6 the government has been producing items from a myriad of  
7 sources, many of which are not related to Mr. Xu. That is not  
8 our understanding in terms of what is at issue. We believe  
9 what is at issue is we take in a number of electronic devices  
10 or accounts -- so we had e-mail accounts, we had an iCloud  
11 account -- that we attribute to Mr. Xu. I understand they can  
12 contest that. And within the iCloud account, which has been,  
13 frankly, the most voluminous issue, it has backups of a couple  
14 phones that had a lot of data on them.

15 And then we also have devices that were recovered in  
16 Belgium at the time of the arrest of Mr. Xu and his colleague.  
17 Those, frankly, are smaller in terms of the volume of data.  
18 The largest item and where most of the translations have come  
19 from has been from that iCloud account and the backups within  
20 it.

21 When the FBI went through and tried to triage what they  
22 wanted to translate --

23 And by the way, given who Mr. Xu is or who we contend he  
24 is, the FBI has, you know, tried to find what they thought  
25 would be relevant. They certainly had an incentive to look for

1 things.

2 -- they were triaging and looking for, okay, who were other  
3 individuals who might have been in MSS. We think this person  
4 is. You know, Joe Smith is a colleague we think is in MSS.  
5 Let's start triaging those and seeing if we need to pull those  
6 conversations or those messages and translate them.

7 When we got the translations, as we said, we produced  
8 those. They are part of the 9,000 pages. We are not going to  
9 present anything that is not within the 9,000 pages of  
10 translated documents. Obviously, there was testimony, but --

11 MR. KOHNEN: Can you repeat that? Sorry.

12 MR. MANGAN: I said it before as well.

13 THE COURT: Can you read that back.

14 (Record read.)

15 MR. MANGAN: And we will have witness testimony. What  
16 I'm talking about is, so, for example, for the iCloud account,  
17 what we've translated out of that account and what we've pulled  
18 out, presented to them, will be the subset, if you will, from  
19 which we will pull our evidence related to that evidence, if  
20 that makes sense to the Court.

21 In other words, we're not going to suddenly show up with  
22 something in Mandarin from a different part of the iCloud that  
23 we did not previously translate.

24 Hopefully, I've made that more clear instead of more muddy.  
25 But when you go through that, they translated all that

1 information, so my understanding is what's left or sort of  
2 what's at issue is are the items that were not translated.

3 I do want to mention, within those things that were  
4 translated, we're not going to use all of them. Sometimes they  
5 found conversations between people, they thought it was going  
6 to be important, they're talking about dinner arrangements,  
7 they're taking pictures of their dinner. You know, there are  
8 things in there that we're not going to use all of this stuff.

9 THE COURT: That's within the 9,000 documents?

10 MR. MANGAN: Yes, yes.

11 THE COURT: Okay.

12 MR. MANGAN: So you're not going to find that every  
13 line of that was on point. They were trying to triage and find  
14 the things that were relevant as best they could.

15 A couple other things to be mentioned. When they talk  
16 about things came from a myriad of sources outside of Mr. Xu, I  
17 don't know who they're referring to other than maybe the  
18 devices that his colleague had on him.

19 My understanding is, you know, the dispute here relates to  
20 the untranslated pieces of the electronic evidence that we  
21 contend went with Mr. Xu or his associate in Belgium. There  
22 was nothing else that we grabbed from other sources, frankly,  
23 as far as electronic evidence that is not translated.

24 Secondly, they mentioned -- I took offense to this -- that  
25 the government padded the discovery with irrelevant documents.



1       He has text messages with the individual. Those are part  
2 of what has already been translated and what has already been  
3 produced. xxx  
4 xxxxxxxxxxxxxxxx we produced as well and put them in a separate  
5 category.

6       These additional documents, you know, xxxxxxxxxxxxxxxxxxxxxxx  
7 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, it's less than 300 pages. It's like  
8 this (indicating). So for them saying that we've expanded the  
9 scope and xxx  
10 xxxxxxxxxxxxxxxx.

11       When they mention that we've made discovery unduly onerous  
12 or overly onerous, mainly they refer to the BOP situation,  
13 which we cannot control. We're trying to work with it, because  
14 I think everybody throughout the case has been trying to find  
15 accommodations to make that as reasonable as possible. But  
16 with respect to *Brady* obligations, we are doing everything we  
17 can. We are not doing anything to make discovery overly  
18 onerous or unduly onerous, as required -- or as stated in  
19 *Warshak*.

20       With respect to the data, a couple things that I do want to  
21 pull out for the Court. When you look at these -- we call them  
22 UFED reports. So take the iCloud account. When it was  
23 produced, I think as you'll recall, we originally took the  
24 account in its raw data format and provided that electronic  
25 information to the defense in the raw, sort of, forensic



1 format. And they said, "Well, you need software. You need to  
2 hire somebody to do that to be able to read it." Fine.

3 So we went back and took that same account, ran it through  
4 something that creates what we call a UFED report. It's an  
5 electronic report so that, when you pull it up, it has a table  
6 of contents on the left-hand side and you can click on those  
7 things. So, for example, it might have e-mails. It might have  
8 SMS messages, which are texts. It might have phone calls, just  
9 a phone log. It's a little bit scary, frankly, what all it  
10 finds on there.

11 It will have a timeline. You can hit timeline, and it will  
12 pull up all of the data on the report, whether it's a call or  
13 an e-mail or a text or a picture, and it will put it in  
14 chronological order so you can actually -- it will pull from  
15 the different sources and put it in chronological order. It  
16 will have pictures, it will have videos, audio. It will break  
17 it down into various categories. And then when you go and  
18 click in those, it might bring up -- you know, so, for example,  
19 SMS messages, it might look like this. So it's a table, and  
20 then either it shows you the actual message in a table format,  
21 or if it's a document or an audio, you click on it and then you  
22 can get into the content.

23 So with respect to phone numbers, you can look for phone  
24 numbers. You can look at things chronologically. They said  
25 you can't search things by date. This is actually, more than

1 any other piece of information, this kind of format you can  
2 narrow things down by date through the timetable. If you --  
3 you know, a number of these folks in the WeChats, they're  
4 identified either by name or a nickname or a phone number, so  
5 you can pull specific people.

6 You know, beyond that, yeah, there's a lot in there, but we  
7 did our best to try to cull it down to provide, as you called  
8 it, hot docs, which is essentially, you know, the way that we  
9 were trying to proceed with this case in an orderly fashion.

10 Then the last thing I'll say, Your Honor, is I don't know  
11 what I would look for to find exculpatory information in this,  
12 because we have sort of an odd case where -- and they have the  
13 right to do this -- but, you know, we contend he is a certain  
14 person and they contend he is not, or they may assert that he  
15 is not at all who we say he is. So everything that we find  
16 that asserts any connection to MSS or that work we would  
17 consider inculpatory. Anything that we would consider -- an  
18 alias we might consider inculpatory; they might consider it  
19 exculpatory. We produced those as well where he's used other  
20 names because we consider that inculpatory.

21 If there is a search term, I don't know what it would be.  
22 I just don't know what I would look for specifically in there.  
23 But we've done the best we can, and we've tried to make this as  
24 orderly as possible.

25 Given the allegations that were put in the reply, we would

1 like to offer, you know, these two exhibits so that the Court  
2 at least can have as much detail as you would like to  
3 understand what the government is doing in this case with  
4 regard to discovery.

5 If I could have one moment, one minute.

6 THE COURT: Yes.

7 MR. MANGAN: Is there anything else?

8 (Mr. Mangan and Ms. Glatfelter confer privately.)

9 MR. MANGAN: So Ms. Glatfelter is pointing out a  
10 better page in terms of the screen shot. But this shows you on  
11 the left, it's a little dark, but it kind of shows you the  
12 table of contents and the tabs, the type of tabs that you could  
13 click on within the UFED report to find things.

14 MS. GLATFELTER: And up on the top right, you could  
15 put in the phone number. For example, if you wanted to see if  
16 Mr. Xu was in contact with particular phone numbers or people,  
17 you would put it up in that right-hand corner. You could  
18 search the report, and it would cull the contacts. Every time  
19 that phone was in contact, the last contact, whether it's been  
20 an SMS message, whether it's been a WeChat message, those would  
21 all come up. And you could see the same thing in the timeline.

22 So that UFED report is certainly searchable in some of the  
23 ways that they want to search.

24 MR. MANGAN: But that's really all I have to say, Your  
25 Honor. Obviously, it's whatever questions --

1 THE COURT: My visceral reaction is I would like those  
2 documents in the record. If I do that, I think you get a reply  
3 memo only as to those documents, if you wish. I'm not sure  
4 that's required. That's my initial reaction to that.

5 MR. KOHNEN: But for the record, Judge, we have no  
6 objection to them, to their submitting it to the Court.

7 THE COURT: Thank you.

8 MR. KOHNEN: But we would like to get -- you know,  
9 just have a look at them. We've received them all, I believe.

10 MR. MANGAN: Yeah.

11 MR. KOHNEN: And I'm going to take the prosecutors at  
12 their word.

13 THE COURT: Right.

14 MR. KOHNEN: But I don't want to spend the time here  
15 to confirm that.

16 THE COURT: Understood.

17 MR. MANGAN: Fair enough. We provided copies, but  
18 this is the correspondence we sent to them.

19 We would ask, Your Honor, if we could keep it under seal,  
20 because it does go through certain names and classifications.

21 MR. KOHNEN: No objection to that, Judge.

22 THE COURT: The Court's comfortable with that as well.

23 MR. KOHNEN: And just -- oh, sorry.

24 THE COURT: Do you have questions or comments for the  
25 government? You had a question when we started, Ms. Frankian.

1 Based on what they've said, do you have anything you wish to  
2 inquire of the government?

3 THE LAW CLERK: Would the government object to telling  
4 the defense what search terms you used so that if there are any  
5 additional -- I mean, I'm sure a lot of it was, you know,  
6 names, phone numbers, and things like that. But if, for  
7 instance, you ran a search for the word "university" and just  
8 translated wherever that popped up or something like that.

9 MR. MANGAN: I'd have to -- my only reluctance is  
10 being able to reconstruct how they triaged, because sometimes  
11 they might be looking -- sometimes it might be a name,  
12 sometimes it's more of a personal connection or -- so I think  
13 the analysts who were trying to look through it, it might have  
14 been a winding road.

15 So that's my only hesitation, is can I fully reconstruct  
16 exactly what each person looked for. If the Court ordered, we  
17 could certainly go back and try to endeavor to do that. I  
18 just -- it wasn't like, sort of, the simple thing where you  
19 get, let's say, a complete e-mail file and you just do search  
20 words, you know, like in a corporate case, to pull something.  
21 This was, I think, a little bit different because they were --

22 You know, certainly there were certain companies they could  
23 look for and I think they did look for. Certain universities  
24 came into play. But I think as they found different MSS  
25 individuals, I think, you know, it changed. So if there's a

1 number, phone number, that they didn't know who it was, they  
2 might have done more searches to figure out who this is, does  
3 it seem like a person they're interested in. If they looked at  
4 it and realized, "Oh, no. This is his gardener," they might  
5 have disregarded it.

6 So that's, without sort of knowing, you know, every single  
7 thing that they did, that's my only hesitation, is I don't know  
8 that I can fully reconstruct it, but we could try to do it,  
9 whatever the Court would ask.

10 THE LAW CLERK: So maybe -- I'm sorry.

11 THE COURT: Is there a follow-up question to that  
12 about them providing search terms?

13 THE LAW CLERK: Perhaps it would be easier if the  
14 defense wanted to provide search terms not for the purpose,  
15 necessarily, of translating them but just to see is there a way  
16 that you can easily go through, as easily as possible go  
17 through and just identify where that particular name or that  
18 particular word comes up, and just provide those so that at  
19 least they can go straight to that e-mail or that --

20 MR. MANGAN: That might -- that might be something we  
21 could do.

22 THE COURT: So I'm not holding anybody to it yet, but  
23 you don't find something extraordinarily prohibiting your  
24 giving them your best recollection of the search terms you  
25 used?

1 MR. MANGAN: I'll want to go back and, sort of, talk  
2 with the FBI and try and understand how best they can  
3 reconstruct that.

4 THE COURT: And if they have search terms, you might  
5 consider using those for them?

6 MR. MANGAN: Yeah, I was going to say, the second  
7 point in terms of them providing search terms might get more to  
8 the heart of what they're complaining about, and that would  
9 certainly be easier to execute.

10 THE LAW CLERK: The reason I asked about them  
11 providing the search terms was just so that the defense doesn't  
12 provide a list that they've already searched. But it seems  
13 like it's harder for them to reconstruct what they've already  
14 done, rather than the defense providing it, as opposed to the  
15 other way around.

16 MR. MANGAN: Yeah. There might be a deduplication  
17 issue there, but --

18 THE COURT: Did you have other comments or questions  
19 for the government? Because I'm going to give them a reply,  
20 and then I'll want to clarify something, and I want to touch  
21 base on the calendar.

22 THE LAW CLERK: No, Judge, I don't think --

23 MR. MANGAN: I'll say one thing. If that's the way  
24 the Court goes or we agree to do something where they provide  
25 search terms, we do not agree that that is what is compelled by

1 *Brady* --

2 THE COURT: Right.

3 MR. MANGAN: -- and that we have not satisfied it, but  
4 in order to help, we are certainly open to that.

5 THE COURT: I think that's an important and understood  
6 statement.

7 Did you want to reply in oral argument?

8 MR. KOHNEN: Yes, Your Honor.

9 First, I want to say thank you for the progress we've made  
10 on this issue.

11 THE COURT: Thank you.

12 MR. KOHNEN: Also I want to -- again, clarification  
13 first. With respect to the UFED reports, as they refer to  
14 them, we're not yet able to work with them. We've got a  
15 vendor, but because of the protective order and other factors,  
16 we have to completely divorce all of this stuff from our  
17 existing systems at the office. And we're working now with a  
18 new software to use to work. I think it's Summation. Unless  
19 the software -- I mean, I've seen printouts of the UFED stuff  
20 that they referred to and I've seen some of those screens, but  
21 I didn't know it was searchable.

22 THE COURT: Well, let's see if we can clarify that  
23 now.

24 Can we?

25 MR. KOHNEN: We'll work on that.



1 MR. MANGAN: The CD that it's on comes with its own  
2 reader, but there is no separate software that's required.

3 MR. KOHNEN: Okay.

4 MR. MANGAN: You can take a computer out of the box  
5 and plug this in and you can read it and work with it. I  
6 believe there was an issue earlier when we --

7 Correct me if I'm wrong, Ms. Cors.

8 When we sent the document that had our cross-reference,  
9 they had some questions about trying to find things, and we got  
10 on the phone, and I remember it was Ms. Cors and then two other  
11 associates or paralegals.

12 MS. CORS: Two technologically savvy.

13 MR. MANGAN: Okay. Well, then two -- you were right  
14 with them, but the other two seemed more savvy. And so we  
15 all -- they got on the system, and we had it up as well, and we  
16 had a conference call and we tried to walk through, "No. You  
17 click on this and then you click on this," because I think they  
18 were having trouble opening the audio files. We helped them  
19 kind of find, "No. You go to the right-hand side and you  
20 click, right click, and it will open." And so we worked  
21 through a few of those issues.

22 That was some time ago, and I have not heard anything until  
23 today that they had issues.

24 MR. KOHNEN: Judge, and I am probably the least  
25 technically savvy person, maybe second-least, so I may have

1 overstated the problem, or misstated.

2 I don't know yet whether Mr. Xu has the capability to  
3 search the UFED reports, but I'll get an answer to that  
4 question very soon.

5 MS. CORS: I don't believe that he does, because right  
6 now he's using a computer with an English keyboard. I'm not  
7 aware of any way for him to actually search what's there.

8 Unless you guys know a way. I mean, he doesn't have  
9 Internet access.

10 THE COURT: Ms. Frankian?

11 THE LAW CLERK: I think even with the English  
12 keyboard, because a Chinese keyboard has English letters on it,  
13 so it would -- and so it would just convert. It's pinyin, so  
14 you just put it in phonetically and it just converts it to the  
15 character. So if he were -- and that's very likely the way,  
16 you know, that he was typing just in his, you know, sending  
17 e-mails to friends and family. And I don't believe that you  
18 need any particular software for it to do that. I think  
19 there's just a setting that you can select.

20 MR. KOHNEN: Except for the reader that they  
21 mentioned.

22 THE COURT: I didn't hear you.

23 MR. KOHNEN: Except for the reader that Mr. Mangan  
24 mentioned, or Ms. Glatfelter.

25 THE LAW CLERK: I believe it was on the disk already.

1           MR. MANGAN: That is how you interact with it. You  
2 click on the reader, it opens up the document, and you're off  
3 and running.

4           MS. GLATFELTER: You can work it from the CD, or you  
5 can -- I've saved it on my hard drive. So I have a file I open  
6 up, and it goes right to it.

7           THE COURT: So we're going to hear a little bit more  
8 of your reply?

9           Just to lighten your load, it's T.S. Black, "Technically  
10 Savvy Black." Go ahead.

11          MR. KOHNEN: Thank you, Judge. The first I've heard  
12 of that.

13          We have no problem with the -- Mr. Mangan said they tried  
14 to present these things so that they would not be onerous. And  
15 he said that they provided them in stages and he said that he  
16 provided English, they were English translations.

17          I want to be clear with the Court. We don't have any  
18 problem with the English translations. We can read and  
19 understand English very well. And we've had those translated,  
20 the ones that we think that are significant, into Mandarin.  
21 Okay? We don't have a problem with how they've presented it.  
22 They've sent us nice letters and informative indexes, as you'll  
23 see. What we're talking about is all of this material that  
24 they gathered that is in Mandarin that likely would be helpful,  
25 pieces of which likely would be helpful to us.

1 I've had the pleasure of working before this Court, and  
2 there's all kinds of things that don't seem to others to be  
3 relevant during the cross-examination of a witness, et cetera,  
4 that from the defense perspective becomes very useful. And so,  
5 you know, we have to get at that stuff. And I really -- that's  
6 why I really appreciate this new willingness to sort of help  
7 accommodate us and search through that data.

8 But I want to be clear. You know, everybody, except for  
9 us, is assuming that all of this stuff belonged to Mr. Xu and  
10 belonged exclusively to Mr. Xu. I want the record to be clear  
11 that we're going to challenge the authentication of this stuff  
12 from day one, because we've seen shared e-mail accounts, shared  
13 iCloud accounts. We've seen -- Mr. Mangan refers to aliases of  
14 Mr. Xu. But we've connected some of these alleged aliases to  
15 actual people.

16 So these are all questions that remain open, and there are  
17 things that, with a competent review of the Mandarin material  
18 that's been sent to us, we can probably distinguish, at least  
19 on occasion, which separate individual is saying what through  
20 the same e-mail. It's going to be very critical to our  
21 defense. And I was reluctant to flag it, but it's that  
22 important to get at it.

23 So, you know, the translated -- so we're sort of back to  
24 square one here, because the translated material is only  
25 inculpatory. Mr. Mangan did a pretty good job --

1 I didn't understand much of it, but that doesn't have  
2 anything to do with his job. That has to do with my  
3 capabilities.

4 -- of describing the method by which they searched for  
5 inculpatory material. It seems to me, especially given the  
6 unique circumstances of this case, that they can employ or  
7 deploy a similar method to help us help them fulfill their  
8 obligation to find exculpatory material.

9 THE COURT: I understand that that is your argument.

10 And can you click that page.

11 Go ahead.

12 MR. KOHNEN: The other thing I just want to touch on,  
13 this claim from Department of Justice lawyers that they can't  
14 control the conditions of Mr. Xu's confinement, we just find it  
15 really hard to believe.

16 Example: If the United States Attorney were to talk to the  
17 Bureau of Prisons and the U.S. Marshals Service about an  
18 alteration of this gentleman's conditions of confinement, it  
19 would happen. If a deputy attorney general talked to the  
20 Bureau of Prisons about this man's conditions of confinement  
21 and sought a change, it would happen.

22 So it's not that they don't have the power to do it. It's  
23 that the Department of Justice, which is also the parent  
24 department of the Bureau of Prisons, has the power to do it.  
25 They don't do it. And they have their own reasons, but I want

1 to make sure the record's clear, because this is a serious,  
2 serious impediment to us being able to do our work to represent  
3 our client.

4 Ms. Cors?

5 If I may, Your Honor.

6 THE COURT: Yes.

7 MS. CORS: The only other point I would reference, I  
8 mean, there appears now there is discovery xxxxxxxxxxxxxxxx  
9 xxxxxxxxxxxxxx. We don't have access to any of those materials to  
10 conduct any search for *Brady* materials from whatever universe  
11 of materials have been collected by the government in each of  
12 those. So, you know, if there is any *Brady* materials in those  
13 universe of documents, only the government right now would be  
14 in a position to be able to identify those and get them to us.

15 THE COURT: Do you have any inquiries, Ms. Frankian?

16 THE LAW CLERK: No, Judge.

17 THE COURT: Did you want a surreply?

18 MR. MANGAN: I think you've heard everything, so --

19 THE COURT: Well, we got off track on the conditions  
20 of his being held.

21 MR. MANGAN: I would just say, with respect to the  
22 documents that we examined and we believe were relevant related  
23 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, we have produced them. We  
24 understand our *Brady* obligations with respect to those as well.

25 My understanding was the main issue that they were framing

1 was specific to this electronic evidence and the accounts that  
2 we have identified, but we do understand our obligations in  
3 that regard.

4 THE COURT: And what have you done in that regard?

5 MR. MANGAN: We've produced -- I think I already  
6 mentioned we produced xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx --

7 THE COURT: Right.

8 MR. MANGAN: -- xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

9 THE COURT: Incriminating documents?

10 MR. MANGAN: Yes. But we've also spoken with the  
11 people involved. We realize we have to coordinate with them to  
12 understand what else they have.

13 THE COURT: Okay. All right.

14 MR. KOHNEN: Judge, when appropriate, I just wanted to  
15 alert the Court to a couple of things, a couple of issues that  
16 we see coming up.

17 THE COURT: Okay.

18 MR. KOHNEN: And I'll wait for my turn.

19 THE COURT: We're almost there. So you're going to  
20 give us these exhibits.

21 Do you want a date by which you need to file a reply, if  
22 any, to the exhibits?

23 MR. KOHNEN: Judge, I think that the chances of us  
24 needing a reply are exceedingly small. But for the -- on the  
25 way-off chance that we might want to present some kind of

1 response to the Court, I would ask for a week to do so.

2 THE COURT: All right. A week from today it will be  
3 ripe whether you file or not.

4 It's been helpful. I appreciate the work that you all are  
5 doing.

6 Anything you want to inquire about before I move to  
7 calendar and whatever else he wants to bring to my attention?

8 THE LAW CLERK: So do we want to set a date for you to  
9 provide the government with a list of search terms?

10 THE COURT: Are you interested in that?

11 MR. KOHNEN: Absolutely, yes. It may be a little  
12 premature for a date depending on what -- I think Tim has to,  
13 Mr. Mangan has to figure out if we actually can get it done.  
14 Maybe not.

15 MR. MANGAN: Maybe I misunderstood.

16 MR. KOHNEN: Are you talking about a date for search  
17 terms?

18 THE LAW CLERK: Uh-huh.

19 MR. KOHNEN: Yeah. I mean, we're happy to do that  
20 if --

21 Will your folks be able to deploy the same tactics and  
22 strategies that they used to find inculpatory material in  
23 looking for exculpatory material?

24 MR. MANGAN: Without talking with them, I believe they  
25 could. The forensic piece to all of these, by the way, is in



1 your hands as well. We would use the tools that they have  
2 where they are able to, you know, as a forensic examiner, open  
3 them and do searches, so --

4 THE COURT: Nevertheless, although you don't believe  
5 it's your obligation, if they gave you some search terms, you'd  
6 be willing to run them?

7 MR. MANGAN: Yes. And if we encounter any issues,  
8 we'll advise everyone.

9 THE COURT: And can we limit how many search terms  
10 we're talking about?

11 MR. MANGAN: That was going to be my next question.

12 THE COURT: Two or three, or, I mean, what's the  
13 ballpark number?

14 THE LAW CLERK: May I ask just one question?

15 THE COURT: Yes, yes.

16 THE LAW CLERK: In light of the fact that any search  
17 terms they provide you would search for using the same software  
18 or the mechanism that they have access to as well --

19 Is that -- did I understand that correctly?

20 MR. MANGAN: Yes.

21 THE LAW CLERK: You don't have any method of searching  
22 that they don't have access to?

23 MR. MANGAN: We have -- the forensic examiners have  
24 tools where they can open it up and, you know, what they call  
25 exploit the document or exploit the file.

1       The raw data was provided to the defense. They did not  
2 choose to engage someone to do that kind of work. So our  
3 forensic examiner took and put it into a UFED report, which is  
4 what we did provide to them, so that someone can just open it  
5 up and search through it on their own.

6       But they may have other tools. That's what I need to  
7 check.

8               THE LAW CLERK: Okay. I thought that maybe the easier  
9 way to do it would be for you to get -- or maybe they can come  
10 to your office and you can show them how you search for the  
11 first term, and then they can go back to their office and  
12 search for the rest of the terms themselves, or something like  
13 that. That way they don't have to provide you with all of the  
14 terms and then be limited to that. They can search for as many  
15 terms as they want, and you give them a demonstration of how  
16 you would go about it.

17              MR. MANGAN: We can try that. I mean, bear in mind  
18 part of what we're talking about is we need to search in  
19 Mandarin.

20              THE LAW CLERK: Right.

21              MR. MANGAN: So we can start that way and, if it  
22 doesn't work, we can take the terms to the FBI and see if they  
23 can have better luck with it.

24              Does that make sense?

25              THE LAW CLERK: Uh-huh.

1           THE COURT: So you guys are going to confer on this  
2 and try and come up with a plan consistent with what we've  
3 talked about and let us know in 30 days?

4           MR. MANGAN: That would be fine, Your Honor.

5           THE COURT: Is that okay?

6           MR. KOHNEN: I think that's a good idea, Judge.

7           What do you think, Jeanne?

8           MS. CORS: My only other comment, I mean, originally  
9 we talked about the government using the search terms that  
10 they've already used to help identify *Brady*. I would ask that  
11 that not be off the table. I mean, we still are at an  
12 information deficit, from our perspective, that would make it  
13 extremely difficult, if not impossible, to come up with set  
14 search terms to apply to this data without knowing what  
15 companies are we talking about, what trade secrets was Mr. Xu  
16 allegedly trying to obtain. I mean, we still have an  
17 indictment that covers, potentially, companies throughout the  
18 world, and so --

19          THE COURT: And I guess you need the Court to rule,  
20 and we're prepared to.

21          THE LAW CLERK: And I mean, I haven't seen it, so I  
22 don't know, but I would assume there is a finite number, there  
23 are a finite number of companies and potential co-conspirators  
24 identified in the 9,000 documents they've provided. So if you  
25 were to just assume that everything in the -- assuming that's

1 correct, if everything -- you just limit it to the 9,000  
2 documents, or excuse me, 9,000 pages of documents, is that -- I  
3 mean, are there, you know, hundreds or thousands of companies  
4 identified in those 9,000 pages?

5 MR. KOHNEN: I think that's -- I mean, that's a good  
6 question. Because what you're asking is, essentially, is that  
7 what sets the universe, what limits the size of the universe.  
8 And while it's a good question, the problem is going to be with  
9 respect to the 404(b) stuff and other material, I expect.

10 THE LAW CLERK: And that would be resolved --  
11 I'm sorry. Can I see the calendar?

12 MR. MANGAN: I think it's February 24.

13 THE LAW CLERK: That you would disclose it?

14 MR. MANGAN: I think that's the initial disclosure.

15 THE COURT: Yeah, February 24.

16 THE LAW CLERK: So at the very least -- and then you  
17 needed the Court's ruling on some of it. So by, you know, May,  
18 for instance, you would know, not only would the government  
19 have identified it, but to the extent that the defense is  
20 arguing that any of this is not proper 404(b) evidence, you  
21 would also have an answer to that by May, which I would assume  
22 would be helpful in sort of narrowing down that universe.

23 MR. KOHNEN: I think May might be a little ambitious  
24 after I identify one of the problems I see down the road at the  
25 appropriate time, but --

1 THE COURT: Well, we'll get to that momentarily.

2 THE LAW CLERK: I was just going off the briefing  
3 schedule.

4 MR. KOHNEN: The most basic reason why I'm reluctant  
5 to settle on a date -- and I think we're past this now, but  
6 just so you know -- on a date to provide them with the search  
7 terms is we're -- with Mr. Xu we're still finishing up tier  
8 five of the discovery. So we've got all of tier six still to  
9 go through with him and tier -- I believe there's a tier seven  
10 as well. We're doing it, I promise, as quickly as we can, but,  
11 you know, we're limited.

12 THE COURT: Well, you've told us that, and that's fine  
13 and we'll deal with it, but you guys are going to confer in the  
14 next 30 days and see if there's some progress to be made.

15 Bear with me. You made a statement that I had read back  
16 that was a pretty broad statement, and then I thought you  
17 clarified it. You said you're not introducing any documentary  
18 evidence but for from the universe of 9,000 pages, but then you  
19 said "from his stuff that we seized."

20 Were you telling me that there are no exhibits coming in  
21 beyond those contained within the 9,000 hot documents?

22 MR. MANGAN: I wanted to make sure I understood the  
23 question there.

24 That all of our exhibits would come from the 9,000  
25 documents that we've provided?

1 THE COURT: (Nods head up and down.)

2 MR. MANGAN: I'm just trying to think and make sure  
3 there's nothing.

4 THE COURT: It was a broad statement.

5 MS. GLATFELTER: Right. Well, there could be, for  
6 example, physical exhibits, like physical evidence seized.  
7 Right? And there could be summaries of those documents from  
8 the 9,000.

9 MR. MANGAN: But that's all still within the 9,000.

10 MS. GLATFELTER: Right.

11 THE COURT: But you're not going to pull something out  
12 of his iCloud that's not in the 9,000 documents and seek to  
13 introduce that. That was the thrust of your --

14 MR. MANGAN: Correct.

15 MS. GLATFELTER: Yes.

16 MR. MANGAN: Yes, that is correct.

17 THE COURT: Did you want to clarify anything, Mr.  
18 Kohnen?

19 MR. KOHNEN: Not on that subject, no, Your Honor.  
20 Thank you.

21 THE COURT: Has discovery reflected the identity of  
22 all unindicted co-conspirators that you're going that rely on?  
23 Do you understand the question I'm asking?

24 Ms. Frankian, you wrote it, or something similar. Do you  
25 want to restate it?

1           THE LAW CLERK: I don't remember how I wrote it, but I  
2 think your question is, are the names of every known --

3           (Mr. Mangan and Ms. Glatfelter confer privately.)

4           MS. GLATFELTER: We're just making sure we understand  
5 exactly what you're --

6           THE LAW CLERK: Is the name of every known unindicted  
7 co-conspirator contained somewhere within the discovery that  
8 was provided?

9           MR. MANGAN: I think so.

10          MS. GLATFELTER: Right.

11          MR. MANGAN: Unless you have a different answer.

12          MS. GLATFELTER: No. I think you clarified it by  
13 saying "known," so --

14          MS. CORS: And that's within the 9,000 documents?

15          MR. MANGAN: Yes. That was the question.

16          THE LAW CLERK: Okay.

17          THE COURT: The question was whether in discovery the  
18 identities of all known unindicted co-conspirators has been  
19 disclosed.

20          MR. MANGAN: Correct. Yes.

21          THE COURT: Not necessarily in the 9,000 documents?

22          MR. MANGAN: No, within the 9,000 documents.

23          THE COURT: Okay.

24          MR. MANGAN: I thought I was --

25          THE COURT: I think that's important for you to have

1 heard.

2 MR. KOHNEN: I agree. It's very important.

3 MR. MANGAN: And just as a --

4 MR. KOHNEN: And I'm glad that it sets limits.

5 MR. MANGAN: I think as sort of a minor caveat, some  
6 folks within that translated, you know, discovery are referred  
7 to as nicknames. So when you said identified, they're in  
8 there, but there may be a nickname or something like that,  
9 so --

10 THE COURT: Fair enough.

11 MR. MANGAN: Okay.

12 THE COURT: Do you each have any other -- well, maybe  
13 we should pause and hear what you've got on your list, Mr.  
14 Kohnen.

15 MR. KOHNEN: Judge, I really just want to give the  
16 Court a heads-up. In the beginning this morning and then later  
17 during the proceedings the 404(b) issue was raised, and I want  
18 to -- we believe that the question of what is and what is not  
19 404(b) evidence is going to be something that is pretty hotly  
20 contested and something that's going to take a fair amount of  
21 the Court's time, and I just want to give you up a heads-up on  
22 that.

23 Mr. Mangan and Ms. Glatfelter have on occasion, and we're  
24 grateful for this, given us clues with references to a trial  
25 within a trial and a conspiracy within a conspiracy.



1 MR. MANGAN: I don't think we've used that phrase.

2 MR. KOHNEN: Well, we found it in the transcripts.

3 But "intrinsically connected, inextricably intertwined," to us,  
4 all these are pretty sophisticated buzzwords for 404(b) and  
5 non-404(b). In fact, in June after we heard these phrases a  
6 couple times, we started our research and we realized that this  
7 is -- we're going to have a tiger by the tail here. There's  
8 going to be a lot of argument over whether something is  
9 intrinsic, which is -- by its nature it can't be 404(b), or  
10 extrinsic, for example. And that's sort of the master rubric  
11 under which the Court is going to be asked to decide some of  
12 these things.

13 It's a really important problem or important issue to at  
14 least get everybody on the same page on pretrial, because when  
15 you think about it, if we haven't settled this, then the first  
16 time we trot up to the bench and ask the Court to decide what's  
17 relevant or irrelevant even under 403, you're going to -- I'll  
18 be presumptuous here -- but you're going to wish that we'd all  
19 educated ourselves together on this subject.

20 We need -- what we're really going to ask for, then, is not  
21 just disclosure of 404(b) evidence but identification and  
22 disclosure of non-404(b) intrinsic stuff that we're going to  
23 fight over. I know that's a little bit unique and it would be  
24 a little bit unique request of the government, but I think it's  
25 the only way. And we can talk with these guys about this

offline, but I just want to give the Court a clue.

The other thing that's unique to this case that is starting to rear its ugly head in the pleadings, as you've seen, is the Rule of Specialty. This could become a complicated problem, or it could remain a simple issue. We're not sure. But as you probably have thought about, at least I have a lot, the Rule of Specialty comes into play going all the way back to when the government presented this case to the grand jury, because it was the Indictment that the grand jury returned that they submitted to authorities in Europe in order to get the --

THE COURT: Extradition?

MR. KOHNEN: -- extradition approved. Now, the Rule of Specialty sets tight limits on what can be done with that case and its breadth, frankly, going forward.

So this may present a unique problem that we may have to raise with the Court as well. And I just want to -- I'm not here to argue. I'm just here to inform.

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[illegible]

xx, we get worried  
about how much of this was the grand jury made aware of, how

1 much of this was the separate sovereign from which he was  
2 extradited made aware of, how much of this is admissible.

3 I will tell you that our preliminary research says that --  
4 and full disclosure -- there's a split in circuits about  
5 whether a defendant can even raise the Rule of Specialty,  
6 whether he or she has standing to do so. And the Sixth Circuit  
7 hasn't really decided.

8 But these are things down the road that I just wanted to  
9 start the wheels turning on here in chambers.

10 THE COURT: I appreciate the two heads-up, or maybe --  
11 yeah.

12 Did you want anything further today? Did you want to  
13 respond to the two heads-up, Ms. Frankian?

14 THE LAW CLERK: No, Judge. I mean, the only thing I  
15 was thinking is maybe setting an earlier motion *in limine*  
16 deadline or maybe breaking out the intrinsic versus extrinsic  
17 for purposes of 404(b), which from my perspective, just an  
18 issue -- I mean, I would think that rather than the government  
19 identifying it, that that would be a subject of a defense  
20 motion *in limine*. But again, if they're willing to break it  
21 out, I -- just ignore what I said.

22 MR. MANGAN: I think, Your Honor, at the end of our  
23 motion for bill of particulars we tried to lay out a number of  
24 specific examples that we believe are part of the conspiracy.

25 We haven't finished it, but I think you'll find our Rule

1 404(b) disclosure will look very similar in terms of us saying  
2 we believe this is direct evidence of the conspiracy; however,  
3 in an abundance of caution, if the Court rules otherwise, we  
4 believe it is admissible under 404(b) for this reason.

5 So in order for us to sort of cover both, we'll probably  
6 list a lot of the same, same items that have already been  
7 identified both in our reply as well as in our discovery.

8 So I don't think -- I think we'll all know, sort of, what  
9 the list of items are. How you want to kind of rule on them  
10 pretrial is maybe another question.

11 THE COURT: Very well. Well, the calendar calls for  
12 your motion by February 24, and your response and reply is set  
13 forth as well.

14 THE LAW CLERK: They would just give notice and  
15 then --

16 THE COURT: Notice.

17 THE LAW CLERK: Right.

18 THE COURT: Opposition by March 16.

19 THE LAW CLERK: Right.

20 THE COURT: Reply by April 13.

21 THE LAW CLERK: Uh-huh.

22 THE COURT: And then it's before us. You pointed that  
23 out a while ago.

24 Well, we'll brace ourselves for continuing incoming matters  
25 of concern, and we will be responsive. Is there more we ought

1 to discuss today before we adjourn?

2 On the calendar, we're getting ready to docket it?

3 THE LAW CLERK: Yes, unless we need to make any  
4 changes just based on the way it's been developing.

5 MR. MANGAN: We don't have any on our end.

6 MS. CORS: I don't think we have anything.

7 MR. KOHNEN: I don't think we do.

8 THE COURT: Very well.

9 Anything further on behalf of the government?

10 MR. MANGAN: No, Your Honor. I think there's an  
11 Addendum B that the defense is going to submit for the  
12 protective order related to their translator. We had sent them  
13 an edit to it, and I think with that edit, I think we've got  
14 something agreed.

15 Is that correct?

16 MS. CORS: Correct.

17 THE COURT: Good.

18 MR. MANGAN: So just as a heads-up, that will be  
19 coming your way.

20 THE COURT: Thank you.

21 MR. MANGAN: Did you have anything else?

22 MS. GLATFELTER: No.

23 THE COURT: Anything further from the defense?

24 MR. KOHNEN: No. Thank you, Judge.

25 MS. CORS: No.

1           THE COURT: It's been a high honor and great  
2 privilege, and you're excused. We'll go off the record.

3           Yes?

4           MS. CORS: Thank you.

5           THE LAW CLERK: Sorry. Do we want --

6           THE COURT: Back on the record.

7           THE LAW CLERK: Do we want to set another status  
8 conference, and do you want to just reiterate an ends of  
9 justice finding.

10          THE COURT: I'll reiterate the ends of justice finding  
11 that, given the complexity of the case and the need for  
12 adequate time to review discovery and prepare, consider motion  
13 practice, the Court finds that the case is not able to be tried  
14 within 70 days, and, in fact, the time running from now until  
15 the new trial date, the time is tolled pursuant to the ends of  
16 justice, all in an effort to avoid a miscarriage of justice.

17          What was the other item?

18          THE LAW CLERK: Do we want to set another date?

19          THE COURT: Status. Can you and I just discuss that  
20 offline to figure out what's coming and set a status?

21          THE LAW CLERK: Sure.

22          THE COURT: Or do you want to do it now?

23          THE LAW CLERK: No, that's fine.

24          THE COURT: When do you guys want to get together  
25 again? When the Court's ready?

1 MS. GLATFELTER: (Nods head up and down.)

2 MR. MANGAN: That would be fine with us.

3 THE LAW CLERK: Sometime after 30 days, so after  
4 you've conferred about the --

5 MR. MANGAN: Give you an update on the --

6 THE LAW CLERK: Right.

7 MR. MANGAN: Sure.

8 THE COURT: So we'll get an update probably by e-mail,  
9 both sides, within 30 days on those issues, and then we'll  
10 figure out when the next status report really is required,  
11 because we'll be buried in your motions.

12 MS. CORS: Yeah. We may want to set that status after  
13 the 404 briefing is complete. I forget what that final date  
14 was.

15 THE COURT: That was what I was wondering. I think  
16 it's --

17 THE LAW CLERK: April 13th. It says the reply is due  
18 April 13th on the 404(b).

19 THE COURT: So the suggestion is we wait until that's  
20 come in for a status.

21 Well, we're going to hear a status within 30 days on the  
22 stuff we have discussed. We'll set it for status conference  
23 and update that's workable for you thereafter, probably not  
24 before the 404(b) stuff ripens.

25 Okay. You're free to go. Thank you. We're adjourned.

1 MR. KOHNEN: Thank you.

2 MS. CORS: Thank you, Judge.

3 (Proceedings concluded at 11:22 AM.)

4 - - -

5 C E R T I F I C A T E

6 I, Luke T. Lavin, RDR, CRR, the undersigned, certify  
7 that the foregoing is a true and correct transcript from the  
8 record of proceedings in the above-entitled matter and  
9 incorporates the redactions ordered by the Court. Redacted  
10 characters appear as an "x" in the transcript.

11  
12  
13 s/Luke T. Lavin  
14 Luke T. Lavin  
15 Official Court Reporter  
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